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IN THE

Supreme Court of the United States

No. 617

WILLIAM H. HUGHES, ET AL

Petitioners

versus

GREAT AMERICAN INDEMNITY COMPANY,

Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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Petitioners, WILLIAM H. HUGHES, individually and for the use and benefit of his minor children, Mary Louise Hughes and Virginia Sue Hughes, and MRS. OZELLA POINDEXTER HUGHES, pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit, entered in the above entitled case on August 10, 1956. Rehearing denied September 14, 1956.

CITATIONS TO OPINIONS BELOW

There is no written opinion of the District Court. The majority (Judge Rives and Brown) and dissenting (Judge Cameron) opinions of the Circuit Court of Appeals, printed in Appendix "B" hereto, infra, page 24, are reported in 236 Fed. 2d 71. (Advance Sheet No. 1, dated October 22, 1956).

JURISDICTION

The judgment of the Circuit Court of Appeals was entered August 10, 1956. (R. 287). Rehearing was denied (Judge Cameron again dissenting), September 14, 1956. (R. 313). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

Whether or not the District Court was correct in:

(1) Requiring petitioners to separate the injuries they received in each of two collisions, when it was alleged in the complaint and proven at the trial that the automobile in which they were riding was struck head-on by an automobile traveling in the opposite direction, due to the negligence of the driver of the other automobile and with no negligence on their part, and then within two or three minutes and while they were still in a dazed condition, their automobile was struck from the rear by a second automobile, due to the negligence of this second driver, and they were unable to say which of

their injuries were attributable to which collision.

(2) Instructing the jury concerning Sudden Emergency.

STATUTES INVOLVED

L.S.A. Civil Code Article 2324. "He who causes another person to do an unlawful act, or assists or encourages in the commission of it, is answerable, in solido, with the person, for the damages caused by such act."

STATEMENT

The pertinent facts of this case are set forth in the opinion of the Court of Appeals as follows: "Hughes was driving his family south, in the late afternoon on December 2, 1953, in the proper lane on Louisiana Highway No. 8. Soon after Hughes entered the highway, Murray, traveling north on the same highway, and attempting to pass a truck drove his car head-on into the Hughes automobile. The terrific impact dazed, in varying degrees, the occupants of the Hughes car and, while they were still in this condition, House, driving south and failing to see the two automobiles in time, drove into the rear of the Hughes car at a time when House states he was moving "not over twenty miles per hour."(1) "The complaint charges that about three minutes elapsed between the two accidents and the proof tends to sustain

(1) Appendix "B", infra P. 25, 26.

this."(2) "It appears from credible evidence in the record, however, that the House car caused further damage to the Hughes car and new injuries or aggravation of those already inflicted, to its occupants."(3) "The Hughes filed action against Murray's insurer and against appellee, insurer of House. The complaint sought judgment against both insurance companies *in solido* alleging that the injuries were the result of the joint, concurrent and successive negligence of the two insureds. In October, 1955 Murray's insurer paid the Hughes $15,000 in compromise settlement of the claims against Murray and the action was dismissed as to his insurer, reserving all rights against appellee."(4)

The basis of Federal Jurisdiction is that plaintiffs are citizens of the State of Louisiana and defendant is a corporation organized under the laws of the State of New York and authorized to and doing business in the State of Louisiana, and the amount of the claim of each plaintiff is in excess of $3,000.00.

A reference to the medical testimony in the record will disclose that both Mr. and Mrs. Hughes received serious and permanent injuries (R. 180-200), and that the baby, Virginia Sue, received a severe laceration of the brain, which will cause her to be a mentally retarded invalid the remainder of her life. (R. 154-177). Also, that the policy limits of Commercial Insurance Company were

(2) Appendix "B", infra P. 30, footnote 9.
(3) Appendix "B", infra P 31, but see also footnote 10, P. 31.
(4) Appendix "B", infra P. 26.

$20,000.00 and that of Great American Indemnity Company $300,000.00. (R. 39).

At the conclusion of the trial of the case, the District Court instructed the jury:

(1) That if they found that House (the driver of the automobile striking the Hughes car from the rear), was guilty of negligence proximately causing the accident, then their verdict should be for plaintiffs to the extent that they found from a preponderance of the evidence that they were damaged by the collision between the House and Hughes automobile *and only for that.* That defendant was not liable for any injuries or damage caused by the head-on collision and that they were not to award plaintiff anything for any injuries or damages caused by this collision. (R. 249). To which plaintiffs objected,

and

(2) Refused to give the jury plaintiffs Requested Instructions Nos. 10, 11, 12, 13, 14 and 15, and Supplemental Instructions Nos. 3 and 4, all of which pertain to the liability of defendant for the entire damages to the plaintiffs. (R. 258-259). To which plaintiffs excepted.

(3) And instructed the jury concerning the defense of Sudden Emergency, to which plaintiffs excepted on the ground that there was no evidence before the jury which would, under the Louisiana Law, entitle the defendant to the defense of Sudden Emergency. (R. 252-254; 258-259).

After deliberating for a period of three hours, the jury returned a verdict in favor of defendant. (R. 262).

A motion for a new trial was denied (R. 271-274), the Court stating the decision of the Louisiana Court of Appeal for the Parish of Orleans, in *Jarreau, et al v. Toye Brothers Yellow Cab Co.*, 24 So. (2d) 700,

> "* * * is authority for the Louisiana rule that no damages at all will be allowed unless plaintiff proves, by a preponderance of the evidence, the extent of the injuries sustained by him in the second accident." (R. 273).

And

> "Moreover, it would have been extremely unjust in this case to have saddled solidary responsibility upon Great American Indemnity Company for all of plaintiffs' damages when it is so obvious that most, if not all, of their injuries must have resulted from the first collision. Yet, if we had given the jury charges requested by plaintiff's counsel, such could have been the result." (R. 273).

and it felt bound to follow this decision.

REASONS FOR GRANTING THE WRIT

The District Court ignored the law of the State of Louisiana and charged the jury in accordance with its own determination of what it thought the law of Louisiana should be, and the Court of Appeals approved of this action.

1. The decision of the Court below is in direct conflict with the decision of this Court in the cases of

Fidelity Union Trust Co. v. Field, 311 U.S. 169, 61 S. Ct. 176, 85 L. Ed. 109, and *King v. Order of United Commercial Travelers of America*, 333 U.S. 153, 68 S. Ct. 488, and of the Court of Appeals, First Circuit, in *McCoy v. Providence Journal, et al*, 190 F. (2d) 760, which hold that Federal Courts must ascertain and apply the law of the appropriate state in every case, and it is only when the Courts cannot make this determination that they are at liberty to make their own determination of what the Court of Last Resort of that state would rule in a similar case.

The case of Jarreau, et al v. Toye Bros. Yellow Cab Co., et al, supra, is not authority for the rule of law that plaintiffs in cases such as this must separate the injuries received in each of the two collisions.

It is clear from a reading of the decision in this case that *Jarreau was himself negligent in the first collision*, which, of course, barred him from recovery for the damage sustained in that collision, and it of course then became incumbent upon him to prove his damage as a result of the second collision. That the Court of Appeals found Jarreau negligent in his first collision is clearly shown by the following from the opinion of the Court:

> "It may be that some of the damage was caused by that negligent act of Serio, but the burden of proof was on the plaintiff to distinguish between *the damage already caused by his own negligence* and the additional damage which may have been caused by the negligence of Serio. (Emphasis added). (Serio was the driver of the Yellow Cab).

Counsel for defendant argued in the Court below that contributory negligence would have barred Jarreau from recovery for the damage caused by the Yellow Cab in the second collision under the theory of the tort-feasors being liable in solido, but the fallacy of this argument is readily seen when it is remembered that contributory negligence is a special defense in Louisiana and must be specially pleaded and proven. (See *Buechner v. City of New Orleans*, 112 La. 599, 36 So. 603, 66 L.R.A. 334; *Hayes v. Illinois Central R. R.* 83 So. (2d) 160), and it was not pleaded in the Jarreau case, nor was it pleaded or proven in this case.

It having been shown that the Jarreau case, which is the only case cited by the District Court and the Court of Appeals as authority for the Louisiana rule of law that the injuries must be separated, is not applicable to the facts of this case, this leaves only the determination by the District Court that "* * it would have been extremely unjust in this case to have saddled solidary responsibility upon Great American Indemnity Company for all of plaintiffs damage, * *" and the approval of this by the Court of Appeals in stating that House was a mile away from the wrecked cars when the first collision occurred, and, "That episode was *fait accompli* and the injuries produced by it had actually been sustained. No act or omission of House had any influence, direct or indirect, on inflicting those injuries."(5) And this was the basis of their decision, without considering what the Lou-

(5) Appendix "B" infra P. 30, 31.

isiana law was in the matter, and particularly what the highest court (the Supreme Court of the State of Louisiana) would probably hold the law of the State of Louisiana to be under the facts of this case. This is certainly not in compliance with the duty of the Federal Courts, as set forth by this Honorable Court in the case of *Fidelity Union Trust Co. v. Field and King v. Order of United Commercial Travelers of America*, supra, and as recognized at the law by the Court of Appeals, *First* Circuit, in the case of *McCoy v. Providence Journal, et al*, 190 F. (2d) 760.

2. Louisiana Civil Code, Article 2324, is applicable to automobile accident cases, as well as to other tort cases. *Williams, et al v. Pelican Natural Case Co.*, (Supreme Court) 187 La. 462, 175 So. 28; *Eagen v. Tri-State Oil Co.*, 183 So. 124 (Ct. of App. 2nd Circuit); *Falgout v. Younger*, 192 So. 706; *Abrego v. Tri-State Transit Co.*, (Ct. of App. 1st Circuit) 22 So. (2d) 681; *Lynch v. Fisher, (Ct. of App.* 2nd Circuit) 34 So. (2d) 513; *Carolina v. Mack, et al*, (Ct. of App. 2nd Circuit) 55 So. (2d) 4; *Rhea v. Daigle, et al*, (Ct. of App. 1st Circuit) 72 So. (2d) 643; *Woodward, Wight & Company, Ltd. v. Douglas Public Service Corp., et al*, (Ct. of App. 1st Circuit) 75 So. (2d) 896; *Peranio v. Superior Insurance Company*, (Ct. of App. 1st Circuit) 76 So. (2d) 315; *Phillips Petroleum Co. v. Hardee* (Ct. of App. 5th Circuit) 189 F. (2d) 205.

The Courts of Louisiana under Article 2324 of the Civil Code, have recognized the law of Louisiana to be:

(a) That there may be more than one proximate cause of an injury, and defendant cannot escape liability

because a third person is responsible for a concurrent proximate cause. *Falgout v. Younger*, supra.

(b) That where the negligence of two or more persons combines to cause an injury to a third person, all of the persons whose negligence concurred in and contributed to the injury are liable in solido, "and the plaintiff in such a case is not concerned with the question of the degree of negligence as between the co-defendants, or their respective rights inter sese." *Abrego v. Tri-State Transit Co.*, supra; *Woodward, Wight & Company, Ltd. v. Douglas Public Service Corp.*, supra.

(c) That negligence on the part of the other tort feasor was not a foreseeable consequence of defendants negligent act is not a valid defense. *Arnold v. Griffith*, (Ct. of App. 2d Circuit) 192 So. 761. The Court stating concerning this defense, "This, if true, would cause an anomalous situation. Two parties, both of whom were negligent, could combine forces causing consequences, neither of which standing alone would have been sufficient to cause, with both able to plead unforeseeability of negligence on the part of the other. Thus, the injured party, entirely without fault, would be unable to recover against either. Fortunately this is not the law."

(d) "It is not necessary for one to be liable that his negligence or negligent act be the sole cause of the accident, it being sufficient that his negligence concurs with one or more efficient causes, *nor is it necessary that the acts be related one to the other. It is material that each contributed in fact to the consummation of harm,*

and there must be a legal or proximate cause flowing from a casual connection in fact." *Carolina v. Mack, et al,* supra. (Emphasis added). See *Phillips Petroleum Co. v. Hardee,* supra.

The decision is in direct conflict with this same Court's decision in Phillips Petroleum Co. v. Hardee, supra. In this case, this same Court of Appeals (5th Circuit) had this to say: "Louisiana, in common with many other jurisdictions, gives full support to the rule that where persons acting independently are guilty of negligence, and the results of their negligence combine to set up a chain of causation resulting in the complained of damage, these persons, though not acting in concert, are yet joint tort feasors, and, as such, are liable for the damage caused by the conjunction of their separate negligence, *just as in collision cases,* persons acting separately and independently are none the less liable for the whole damage caused when their negligence concurs to produce the result." "* * * Where the concurrent or successive acts or omissions of two or more persons, although acting independently of each other, are in combination, the direct or proximate cause of a single injury to a third person, and it is impossible to determine in what proportion each contributed to the injury, even though his act alone might not have caused the entire injury, or the same damage might have resulted from the act of the other tort feasor."

The facts in the case of *Rhea, et al v. Daigle, et al,* which is fully reported in 72 So. (2d) 643, are identical with those here, except that the rear car there was so

close behind the one ahead, which was struck head-on that the driver was unable to stop before striking it. The plaintiffs there, as here, alleged negligence on the part of the drivers of both cars and that they were dazed or unconscious as a result of the first collision, and were therefore unable to say which of their injuries were received in either of the collisions. The District Court found the drivers of both cars negligent and gave plaintiffs judgment in solido against the drivers of both the cars striking the car plaintiffs were in.

The Court of Appeals, First Circuit, after reviewing the facts of the case, found as a fact (and contrary to the District Court) that the driver of the car striking from the rear was not negligent and the judgment, insofar as it pertained to this driver and his insurance carrier was reversed and the suit against them dismissed. *But the Court of Appeals did not reverse the holding of the District Court of solidary liability of the drivers of both the car colliding head-on with plaintiffs car and that colliding from the rear, although it quoted extensively from the opinion of the lower court.* Also in the very similar case of *Carolina v. Mack, et al*, supra, plaintiffs car was struck from the rear by another being negligently driven by defendant Mack and propelled into the other traffic lane into the path of another vehicle being driven by one Pino, by which it was again struck. The Court of Appeals, in discussing the liability of Pino, if he were negligent, stated that it was not necessary that his act be the sole cause of the accident nor that the acts be related one to the other, it being sufficent that each contributed in fact

to the consummation of harm. Pino was held to be not negligent, but as in the Rhea case, the other tort feasor was held liable for the entire damage.

The present decision is in conflict with the above principles of Louisiana law, upon which plaintiff's requested instructions Nos. 10, 11, 12, 13, 14 and 15, and supplemental instructions Nos. 3 and 4, were predicated, which said instructions were not given by the Court.

Courts of Appeal for the State of Louisiana have exclusive jurisdiction on appeal of such cases, except where the Supreme Court exercises its supervisory powers by a writ of certiorari, this being set forth in Louisiana Constitution, Article 7, Section 29; the exception to the appellate jurisdiction of the Supreme Court being set forth in Article 7, Section 10 of the Constitution. See also *Mouliere v. Columbian Carbon Co.*, 89 So. (2d) 327, (Supreme Court). And certainly the Courts below are not now at liberty to substitute their own determination of what they think should be the law for what has been clearly announced by the Courts of Louisiana to be the law of Louisiana.

An exhaustive search was made for cases in other states where a person was injured by one automobile and shortly thereafter by another, where the injured party was not negligent and both of the others were, as in this case, and out of cases from sixteen different states it was found that fourteen of the states follow the minority rule, as does Louisiana, and hold the tort feasors liable

in solido. These fourteen states and the cases so holding are as follows:

California:
Sandey v. R. R. Rasmussen, 290 P. 684;

Colorado:
Alden, et al v. Watson, 102 P. (2d) 479;
Alden, et al v. Berg, 102 P. (2d) 479;
Alden, et al v. Stenborn, 102 P. (2d) 479;

Georgia:
Southard v. Hitchcock, et al, 79 S.E. (2d) 342,
Atlanta Newspapers, Inc. v. Hitchcock, et al 79 S.E. (2d) 342;

Illinois:
Osinski v. Benson, et al, 56 N.E. (2d) 665;

Iowa:
Bolton v. Ziegler, 111 F. Supp. 516;

Kansas:
Gibson v. Bodley, et al, 133 P. (2d) 112;
Reed v. Mai, 231 P. (2d) 227;

Missouri:
Flaun v. Briger, et al, 296 Sw. 203;

Nebraska:
Whitney v. Penrod, 32 N.W. (2d) 131;

New Jersey:
Riston v. Frantzen, 102 A (2d) 614;

New York:
Jones Hawks, Respondent v. Henry Gall, et al, Appellant, 24 N.E. (2d) 484;

North Carolina:
West v. Collins Baking Co., et al, 181 S.E. 551;
Barber v. Wooten, 66 S.E. (2d) 690;
Tillman v. Bellaney, 87 S.E. (2d) 253;

Ohio:

Glass v. McCullough Transfer Co., 115 N.E. (2d) 71;

South Dakota:

Krumvieda v. Hammond, 27 N.W. (2d) 583;

Tennessee:

Waller v. Skelton, 212 S.W. (2d) 690;

and it will be noted that a large number of these cases cite 38 Am. Jur., "Negligence", Sec. 257, as does the case of *Phillips Petroleum Co., et al v. Hardee, et al*, supra, as authority for their ruling.

In the two following cases, the Court held that the injuries must be separated: *Michigan, Frye v. City of Detroit*, 239 N.W. 886, Delaware, *Leshman v. Brady, et al*, 3 A. (2d) 118. It will be observed, however, that the Michigan case was decided in 1932 and the Delaware case in 1938, and the Court stated in the Delaware case that the majority rule was otherwise.

We think it important to note that the case of *Phillips Petroleum Company, et al v. Hardee*, supra, was decided by Chief Judge Hutchison and Judges Holmes and Borah, (and it will be recalled that Judge Borah was promoted from the U. S. District Court for the Eastern District of Louisiana), while this case was decided by Judge Rives, Cameron and Brown, none of whom came from the State of Louisiana.

That it would not be more unjust to hold the defendant in this case responsible for all of the damage (although as a practical matter it would be credited with

the amount of the $15,000.00 paid by the Commercial Insurance Company, the insurer of the joint tort feasor in this case), than to deny plaintiffs the right to recover because they could not separate the injuries received in the second collision from those received in the first, is well illustrated by the statement of the Supreme Court of Texas, in the recent case of *Landers v. East Texas Salt Water Co.*, 248 S. W. (2d) 731, which is similar to the case of *Phillips Petroleum Co., et al v. Hardee, et al*, supra, as follows:

> "Where the tortious acts of two or more wrongdoers join to produce an indivisible injury, that is an injury which from its nature cannot be apportioned with reasonable certainty to the individual wrongdoers, all of the wrongdoers will be held jointly and severally liable for the entire damage."

and with reference to the prior rule requiring separation of the damage caused by each, stated:

> "If such has been the law, from the standpoint of justice it should not have been; if it is the law now, it will not be hereafter. The case of Sun Oil Co. v. Robicheaux is overruled."

and in the case of *Falgout v. Younger*, 192 So. 706 (711), the Court of Appeals of this State stated as follows:

> "We are fully aware of the apparent injustice of holding one of the joint tort feasors guilty of a lessor degree of negligence liable for the whole damage, and through an unwillingness of the injured person to prosecute his claim against the other, or for some other cause permitting the one guilty of the highest degree of fault to go without

any liability whatever. But such seems to be the law of this state, and we are powerless to change it if we were inclined to do so."

It is suggested by the Court of Appeals that the injuries attributable to the separate blows could have been proven sufficiently for the jury to have rendered a verdict in favor of plaintiffs, if they had found that House was negligent, but a reference to the record will disclose that only one person reached the Hughes automobile prior to the second impact, and that he ran to the car and frantically attempted to open the door and being unable to do so, was reaching through the window for one of the children when the car was struck the second time. (R. 84). So it is obvious that it would have been impossible for him to have observed the injuries to these plaintiffs sufficiently before the second impact to describe them with reasonable certainty to the jury, in order that they would have an intelligent basis for apportionment of the damage. The Court of Appeals says, however, that even if it were impossible to separate the injuries attributable to the separate blows, it would not change the principle of law involved. But surely no Court at the present time would say that because a person could not prove, because of injuries he had received in one collision, which was due to the negligence of the other and not his own, what particular injuries he received in that collision, and those received in a subsequent collision, that he could not recover from either of them. And particularly in view of the fact that both the State and Federal Courts in Louisiana have held that this is not required where the injury is to

property. Williams, et al v. Pelican Natural Gas Co., supra, *Phillips Petroleum Co. v. Hardee, et al*, supra.

This, however, is the result of the Court's ruling in this case, as certainly plaintiffs are not to be penalized for settling with the other insurance company, full reservations having been made of all rights against Great American Indemnity Company in said settlement, and it would have been as impossible to prove what injuries were received in the first collision as in the second, if the suit had gone to trial against both defendants.

In view of the impossibility of plaintiffs separating the injuries received in the second collision from those received in the first, and to prove what specific new injuries were received in the second collision, and that specific injuries were received in the first but aggravated and to what extent in the second, it was impossible under the charge of the Court that this must be done, for the jury to have returned a verdict in favor of plaintiffs.

2. The stipulation of facts in the record (R. 37-46) shows that the highway was straight for a distance of about two hundred yards to the north of the point of the head-on collision, the direction from which defendant's insured approached, and that the highway was wet and there was a mist of rain at the time of the accident. House, defendant's insured, testified that while in the curve he met a car whose lights had not been dimmed and that this "kind of bothered" him, but he was then six hundred felt or more from the Hughes automobile, and after this

he looked at his speedometer and he was making forty miles an hour, saying nothing more about anything ususual happening until he saw the Hughes automobile in the highway ahead of him. Certainly this testimony of House does not show that he was confronted with any *Sudden Emergency*, but merely a hazard of the highway.

As Judge Cameron says in his dissenting opinion,

> "The emergency doctrine depends upon the unusual, the sudden, the unexpected, - of such degree as to stun the average man, to blunt his reactions, to rob him momentarily of his ability to think and judge accurately."(6)

and this is shown to be the rule in Louisiana, as the Supreme Court of this State, in the recent case of *Geoghegan, et al v. Greyhound Corp.*, 76 So. (2d) 412, which was reviewed on a writ of certiorari to the Louisiana Court of Appeals for the First Circuit, held that the Sudden Emergency rule would not apply where the driver was confronted by bright lights and the highway was wet but there was no evidence that the cattle *suddenly darted* in front of the vehicle.

CONCLUSION

For the foregoing reasons, it is respectfully urged that this Honorable Court grant this petition for a writ of certiorari, and that in the retrial of the case the District Court be required to properly charge the jury con-

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(6) Appendix "B", infra P. 34.

cerning the liability of the defendant for the entire damage received in the two collisions; and that it be further instructed to refrain from giving any charge concerning Sudden Emergency.

Respectfully submitted,

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APPENDIX "A"

Plaintiffs requested charges which the District Court refused to deliver to the jury.

"Charge No. 10. If you find that the four plaintiffs herein suffered injuries in both the collision between the Chevrolet being driven by Joe B. Murray and the Dodge in which they were riding, and the collision between the Mercury being driven by William H. House and the Dodge, and if you also find that it is impossible to separate the injuries caused to each by each of the collisions, and you also find that the injuries that were sustained by each of the plaintiffs were caused by the joint and combined negligence of both Joe B. Murray and William H. House, then your verdict should be in favor of the plaintiffs and against this defendant, for the full amount of the damages they are entitled to as a result of their injuries."

"Charge No. 11. There may be more than one proximate cause of the same injury, and the mere fact that some other cause cooperates with the negligence of the defendant to produce the injury for which suit is brought, does not relieve him of liability."

"Charge No. 12. * * * If the negligence of defendant is one of the proximate causes of the injury of which plaintiffs complain, he cannot escape liability by showing that the negligence of a third person also contributed to the injury, and that the accident would not have happened but for such negligence of the third person. This rule applies though the two wrong-doers owe different degrees of care, or though there are different degrees of negligence."

"Charge No. 13. It is well settled that where the negligence of two or more persons combines to cause an injury to a third person, all of the persons whose negligence concurred in and contributed to the injury are liable, in solido, and the plaintiff in such a case is not concerned with the question of the degrees of negligence as between the co-defendants, or their respective rights inter sese."

"Charge No. 14. * * * where the concurrent or successive negligent acts or omissions of two or more persons, although acting independently of each other are, in combination, the direct and proximate cause of a single injury to a third person, and it is impossible to determine in what proportion each contributed to the injury, either is responsible for the whole injury, even though his act alone might not have caused the entire injury. * * *"

"Charge No. 15. If you find that Mr. Murray, who was driving the automobile that struck the Hughes car head-on, and that Mr. House, whose automobile struck the Hughes car from behind and whose insurance carrier is the defendant here, were both negligent and that their negligence was concurrent and produced a single injury to each of the plaintiffs, then the plaintiffs here are entitled to recover from the defendant, Great American Indemnity Company, the full amount of the damages suffered by each of them."

"Supplement Charge No. 3. If you find that the four (4) plaintiffs herein suffered injuries in both the collision between the Chevrolet being driven by Joe B. Murray and the Dodge in which they were riding, and the collision between the Mercury, being driven by William H. House and the Dodge, and if you also find that there was no negligence on the

part of plaintiffs which contributed to the collision between the Murray automobile and the Dodge and that it is impossible to separate the injuries caused by each of the collisions, and you also find that the injuries that were sustained by each of the plaintiffs were caused by the joint and combined negligence of both Joe B. Murray and William H. House, then your verdict should be in favor of the plain- and against this defendant for the full amount of damages they are entitled to as a result of their injuries."

"Supplemental Charge No. 4. If you find that Mr. Murray who was driving the automobile that struck the Hughes car head-on, and that Mr. House, whose automobile struck the Hughes car from behind and whose insurance carrier is the defendant here, were both negligent and that their negligence was concurrent and produced a single injury to each of the plaintiffs, and that there was no negligence on the part of plaintiffs contributing to the collision between the Murray automobile and the Dodge in which they were riding, then the plaintiffs here are entitled to recover from the defendant, Great American Indemnity Company, the full amount of damages suffered by each of them."

APPENDIX "B"

In the

UNITED STATES COURT OF APPEALS

For the Fifth Circuit

No. 16026

WILLIAM H. HUGHES, ET AL.,
Appellants,

versus

GREAT AMERICAN INDEMNITY COMPANY,
Appellee.

Appeal from the United States District Court for the Western District of Louisiana.

(August 10, 1956.)

Before RIVES, CAMERON and BROWN, Circuit Judges.

CAMERON, Circuit Judge: This is an appeal from a judgment in the District Court rendered pursuant to a jury verdict in favor of appellee Great American Indemnity Company, insurer of the automobile of William M. House, who drove his car into the back of the the stopped car occupied by William H. Hughes and his family, the ap-

pellants.[1] About three minutes before that accident the Hughes car had been in head-on collision with the car of one Murray, and both cars were standing in the road when House drove his car into the rear of the Hughes car. The Court below charged the jury that it would be authorized to apply the doctrine of sudden emergency in determining whether House was negligent.

Appellants contend that it was error so to charge the jury based upon their theory that the evidence revealed no exceptional circumstances warranting application of the doctrine of sudden emergency. Appellants further contend that the Court below erred in refusing their requested instructions to the effect that appellee would be liable *in solido* for all damages along with Murray's insurer on the contention that Murray and House were joint tort feasors.

According to the facts largely developed by pretrial stipulation, Hughes was driving his family south, in the late afternoon of December 2, 1953, in the proper lane of Louisiana Highway No. 8. Soon after Hughes entered the highway, Murray, traveling north on the same highway, and attempting to pass a truck drove his car head-on into the Hughes automobile. The teriffic impact dazed, in varying degrees, the occupants of the Hughes car, and, while they were still in this condition, House, driving south and failing to see the two automobiles in time, drove

[1] In the Hughes car were William H. Hughes and his wife, Mrs. Ozzello P. Hughes, together with their two daughters, Mary Louise and Virginia Sue. Each of these parties received injuries, some of which were of a very serious and permanent nature. (There were three other children in the car who were not injured and are not parties to the action.)

into the rear of the Hughes car at a time when House states he was moving "not over twenty miles per hour."

The Hughes filed this action against Murray's insurer and against appellee, insurer of House. The complaint sought judgment against both insurance companies *in solido* alleging that the injuries were the result of the joint, concurrent and successive negligence of the two insureds. In October, 1955 Murray's insurer paid the Hughes $15,000 in compromise settlement of the claims against Murray and the action was dismissed as to his insurer, reserving all rights against appellee.

The first error argued by appellants is directed against the charge of the Court below submitting to the jury the question of whether House and his insurer should be exculpated from liability under the doctrine of sudden emergency, appellants contending that there was no evidence tending to sustain this defense. House testified that he had just met an oncoming car while in a curve,—the point of which was stipulated to be six hundred feet south of the place of accident,—whose bright lights "kind of bothered" him, whereupon he dimmed his lights and kept them so until he struck the Hughes car. When he passed the car with the bright lights his speed was forty miles per hour and he proceeded at that speed or less until he suddenly came upon the Hughes car still locked with the Murray car. He testified further that, upon seeing the Hughes car, he immediately applied his brakes, causing his car to skid on the wet road. He was unable to estimate how far his car skidded. He stated that the wrecked Murray automobile was of a faded blue color

and the Hughes automobile of a faded dark green which caused the mass not to be easily visible in the mist of rain.

The Court below delivered to the jury a careful charge about whose language no serious question is raised, setting forth the ingredients of the doctrine of sudden emergency as developed under Louisiana law.[2] The portion of the charge quoted in the note was supplemented by a careful spelling out of the duty of a motorist to maintain a careful and proper lookout, to maintain a rate of speed no greater than would permit him to stop or control the car to avoid striking objects in the road, which speed must be reduced where vision is obstructed by weather conditions or other causes.

Appellant urges with considerable force that House was confronted, not with an emergency, but with an ordinary traffic hazard such as motorists are called upon to face whenever they use the roads. The case is a close one, but we have concluded that, under the evidence, a jury question was presented as to whether House, under the emergency created by those conditions, operated his

[2] These portions of the charge will suffice to demonstrate that the question was fairly presented to the jury: "Of course, if a driver's vision is suddenly and unexpectedly obscured, or if he is temporarily blinded through causes which he, as a reasonable, prudent person could not have anticipated, or there are other exceptional circumstances which he reasonably could not have foreseen he is not held to the same high degree of care but may be said to have been placed in an emergency . . . In such circumstances he may not be said to be guilty of negligence if he makes such a choice as a person of ordinary prudence would have made even though he did not make the wisest choice and one which would have been required in the exercise of ordinary care but for the emergency. . . ."

automobile as a reasonbly prudent person would under the same circumstances.

We are not unmindful that, under the law of Louisiana, it was the duty of House to operate his car at a rate of speed that would give him control of it within the range of vision furnished by his headlights, under the circumstances prevailing at the time; and that failure so to do would constitute negligence. But we have had occasion to examine the Louisiana law on the subject of action in emergencies in the recent case of *Western Production Company v. Yarbrough, et al*, June 30, 1956, 5 Cir.,— F.2d—, in which we concluded that there was a disposition of the Louisiana Courts to apply that rule as flexible and to leave to the jury to decide what was reasonable under the circumstances of each case. We considered the recent Louisiana cases and the decisions of this Court[3] and held that it was proper, under facts not unlike those here present, to submit the question of emergency to the jury for decision.[4]

We have reached the same conclusion here. "The policy of the law has relegated the determination of such questions to the jury, under proper instructions from the court. It is their province to note the special circumstances and surroundings of each particular case, and then say whether the conduct of the parties in that case was such as would

3 New Amsterdam Casualty Co. v. Ledoux, 197, 5 Cir., 159 F. 2d 905; Car and General Insurance Corp. v. Cheshire, 1947, 5 Cir., 159 F. 2d 985; Great American Indemnity Co. v. Cormier, 1951, 5 Cir., 187 F. 2d 107; Atkins v. Halliburton Oil Well Cementing Co., 1952, 5 Cir., 196 F. 2d 876; Hicks v. Tilquit, 1955, La. App., 82 So. 2d 100.

4 We refer to the Yarbrough case for a full discussion of the Louisiana law on the subject, which law is controlling in the case before us.

be expected of reasonable, prudent men, under a similar state of affairs. When a given state of facts is such that reasonable men may fairly differ upon the question as to whether there was negligence or not, the determination of the matter is for the jury.[5]

Nor are we able to agree with appellants in their argument that they are entitled to recover from appellee all of the damages sustained by appellants under the established rule that recovery *in solido* is permitted as against joint tort feasors. We have recognized such to be the law where an accident results from the combined negligence of two or more persons:

> "It is the law in Louisiana that, where two persons are negligent and their combined negligence contributes to and brings about an accident, they are what are known as joint tort feasors or joint wrongdoers. Such tort feasors or wrongdoers are liable *in solido*."[6]

The Court below manifestly started out with the assumption that this rule should be applied to this case.[7] But just before the trial was begun, under the teaching of *Jarreau, et al v. Toye Bros. Yellow Cab Co., et al*, 1946,

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[5] Lowry v. Seaboard Railroad Co., 5 Cir., 1948, 171 F. 2d 625, 630, quoting from the Supreme Court case of Grand Trunk Railway Co. v. Ives, 144 U.S. 408, 417.

[6] The quotation is from Note 3 of our decision in Banks v. Associated Indemnity Corp., et al and companion case, 1947, 161 F. 2d 305, 308. And the same rule is announced in Falgout v. Younger, 1939, La. App. 192 So. 706; and Abrego v. Tri-State Transit Co., 1945, La. App., 22 So. 2d 681.

[7] Being led to that conclusion apparently by our decisions in Phillips Petroleum Co. v. Hardee, 1951, 189 F. 2d 205, and by the Louisiana cases of Falgout v. Younger, *supra;* Rhea v. Daigle, 17 Jud. D. Ct., Terrebonne Parish, La., amended and affirmed 72 So. 2d 643, and Abrego v. Tri-State Transit Co., *supra.*

La. App., 24 So. 2d 700, it announced its intention of submitting to the jury the right to award damages to appellants for injuries demonstrated by the evidence to arise from appellee's action in driving into the Hughes car and no more; [8] and the trial Court refused a large number of instructions requested in writing by appellants based upon the theory that appellants were entitled to recover from appellee all damages sustained by them.

In our opinion, the charges given by the Court below were justified and its action in refusing those requested by appellants was correct. Appellants have assembled a large number of cases from other jurisdictions from which they attempt to develop the thesis which in turn they contend to be the law in Louisiana that recovery *in solido* is permitted against two persons whose negligence causes injury even though their negligent acts are definitely separated and though proof is lacking of joint or concurrent negligence. We do not think appellants' position is sound as applied to the facts of this case. Appellants had received serious injuries in the much heavier impact which took place between their car and the Murray car.

At that time[9] House was more than a mile away from the two wrecked cars. That episode was *fait accompli* and

[8] This excerpt from the charge as given illustrates the manner of the submission of this question to the jury: "If you find that he was guilty of any one or more of such acts of negligence which proximately or directly caused or aggravated the injuries of the plaintiffs you may find for the plaintiffs to the extent that they were so injured but no more."

[9] The complaint charges that about three minutes elapsed between the two accidents and the proof tends to sustain this.

the injuries produced by it had actually been sustained. No act or omission of House had any influence, direct or indirect, on inflicting those injuries. It appears from credible evidence in the record, however, that the House car caused further damages to the Hughes car and new injuries or aggravation of those already inflicted, to its occupants.[10] If these damages and injuries were the result of the negligence of House, appellants would be entitled to recover.

Appellants argue that it would be impossible under circumstances such as those prevailing in this case to make proof which would segregate the injuries attributable to the separate blows. Even if this were so, the difficulty of making proof would not change the principle of law involved. But we do not think that this is true. Damages do not have to be established with mathematical certainty so long as there is evidence that damages did probably ensue from the second collision and so long as a reasonable basis is established for recovery of those damages. What the Supreme Court recently said[11] in discussing the allied subject of negligence points to the rule which should be followed in such a situation: "In considering the scope of the issues entrusted to juries in cases like this, it must be borne in mind that negligence cannot be established by direct, precise evidence such as can be used to show that a piece of ground is or is not an

[10] For example, the evidence showed that the Hughes baby, the most seriously injured of the group, was still in her mother's lap after the first collision. She was thrown to the floor by the lick delivered by the House car and the jury could determine that all, or a considerable part, of her injuries were the product of that impact.

[11] Shultz, Administratrix v. Pennsylvannia R.R. Co., 1956, 350 U.S. 523, 525-6.

acre. Surveyors can measure an acre. But measuring negligence is different. . . . Issues of negligence, therefore, call for the exercise of common sense and sound judgment under the circumstances of particular cases. '[W]e think these are questions for the jury to determine. . . .' . . . Fact finding does not require mathematical certainty. Jurors are supposed to reach their conclusions on the basis of common sense, common understanding and fair beliefs, grounded on evidence consisting of direct statements by witnesses or proof of circumstances from which inferences can fairly be drawn."

Being of the opinion that the Court below did not commit error in the respects argued, its judgment is

AFFIRMED.

CAMERON, Circuit Judge, Dissenting:

I am unable to join the majority in affirming the judgment in this case because I think the jury was probably led to its verdict by the submission to it of the question of whether House was protected by the principles of law governing action in an emergency. Under House's own testimony there was nothing which the law recognizes as an emergency.

House was driving south towards his home at Shreveport, and rounded a sweeping curve as he entered Oil City on a road with which he was thoroughly familiar.

While in that curve he met a car whose lights had not been dimmed. House does not claim that the lights were in any way abnormal, but he stated only that the lights "kind of bothered me." He then looked at his speedometer and he was making forty miles an hour and he slowed down to some extent before he ran into the Hughes car.[1]

He had completely passed the car with the bright lights before entering the straightaway along which the business houses and residences of Oil City were situated. That straightaway was six hundred feet long to the point of the accident. His lights were good and were dimmed by his own action and choice and his brakes were in first class condition. It was misting rain, and the road was wet.

House admitted that he knew he was entering a congested community and the evidence shows that, in the vicinity, were an oil field supply store, a cafe, two ice houses, one or more grocery stores and a motel. The Hughes car and the Murray car were interlocked and were almost entirely on the side of the highway House was traversing. They were situated opposite the entrance of a motel and quite close to the intersection of the highway with what appears from the photographs to be a main street of the town.

All of these facts were known to House and the law charged him with the duty to drive his car in obedience to the dictates of prudence arising from those facts.

[1] He admitted that his speed was about twenty miles an hour at the time of the impact. He drove the two interlocked cars three to four feet and did damage to his own front end costing $711.00 to repair.

One of the fixed facts of the situation was the presence of these two automobiles in his lane of the highway. They were there when he came around the curve. They did not dart or appear suddenly in front of him. They created no more of an emergency than would have been created if a group of children had been crossing the highway to the motel or traveling from the ice cream store the photographs show to be nearby. The witness Elder was actually standing in the road alongside the Hughes car. House would have run into any person or any object situated as was the Hughes car, and the majority opinion absolves him from liability under the emergency doctrine.

Such is, in my opinion, not the law. House was a very experienced driver. He knew how far his lights showed the way in the misting rain. He knew that pedestrains or cars would be likely to be using the road in front of him as they had a right to do. The law required him to anticipate the presence of persons and objects in the road and to accommodate his speed and car control to the known weather, traffic and road conditions, to his ability to see as well as to his own state of excitement or "bother."

The emergency doctrine depends upon the unusual, the sudden, the unexpected,—of such degree as to stun the average man, to blunt his reactions, to rob him momentarily of his ability to think and judge accurately. Does the "bother" of meeting a car with normal headlights qualify under that test and is the spell to be recognized as continuing for ten seconds and six hundred feet? Do misting rain and wet roads and objects in the road qualify? Not under the law of emergency as I understand it.

The Supreme Court of Louisiana has spoken on the subject in its most recent case and has refused to apply the emergency doctrine under facts much more favorable to the driver of the vehicle doing the damage than those here. *Geoghegan et al v. Greyhound Corp.*, La. S. Ct. 1954, 76 So. 2d 412.[2] Greyhounds bus had killed several head of cattle belonging to Geoghegan. It was being operated in a misting rain upon wet pavement at about forty-five miles per hour when it met a car and each driver dimmed his headlights. Immediately after passing that car and raising his headlights the bus driver was confronted with the several cattle which "evidently . . . came in from behind the oncoming car." The trial Court had held Greyhound liable, but the Court of Appeals reversed on the ground that "the driver was confronted with a sudden emergency and did everything to avoid the accident." The Supreme Court of Louisiana did not agree. It differentiated its former holding in *Anderson v. Bendily*, 66 So. 2d 355, with this statement: "The holding . . . is not applicable . . . because all of those cases involves circumstances where animals suddenly darted in front of an automobile operated at a reasonable rate of speed. In the present case the animals walked or 'stalked' onto the highway and did not suddenly dart in front of a bus."

The general rule governing such accidents in Louisiana was thus stated (76 So. 2d 413):

> "'A motorist is held to have seen an object, which, by the use of ordinary care and prudence, he should have seen in time to avoid running

[2] Reversing same case, Ct. App. La. 1st Cir., 1954, 71 So.2d. 642.

into it, and that the driver of an automobile is guilty of negligence in driving at a rate of speed greater than that in which he could stop within the range of his vision.' . . . It is negligence to drive an automobile at a greater rate of speed than is prudent under the circumstances . . .

"The operation of the bus at the rate of forty-five miles per hour under the weather conditions was not the use of ordinary care and prudence and had the driver been operating the bus at a reasonable rate of speed he would have had time to avoid running into the cattle. The surface of the road was wet and his vision was restricted. Under such circumstances he should have operated the bus at a rate of speed that would give him control of his car in event that just such a condition, as he was confronted with, arose. Therefore, the result of the accident was due to his negligence."

This last word of the highest court in Louisiana fits the situation before us perfectly, and establishes a rule which adjudges negligence under circumstances of emergency much plainer than those facing House. He had six hundred feet in which to raise his lights if needed or to discover an object much larger than cows, while Greyhound had no appreciable distance for action. He was approaching a congested community, while such an added burden did not apply in Greyhound's case. The majority decision is, in my opinion, unjustified in the light of this rule so lately stated as the law in Louisiana, and I do not find any element of supposed emergency here which was not present there.

What we said in *Geigy Chemical Corp. v. Allen*, 1955, 224 F. 2d 110, applies here. We held that a motorist was guilty of negligence as a matter of law under circumstances more favorable to him than those here:

> "The large and easily visible truck was certainly occupying appellate's half of the road as he approached the point of collision . . .
>
> " . . . If appellee was blinded so that he could not see up the road towards the truck, it was his duty to bring his car immediately to a stop until the blinding glare should be removed, or at least to bring it under such control that he and those who might be beyond the glaring light would be protected. . .
>
> "The preservation of life and property demands that every motorist stop his car when he cannot see where its motion is leading him. If the mass which loomed up before the unseeing eyes of appellee had been a group of school children, the results would not have been different. The fact is, if a motorist is not to be counted negligent when he meets a car having normal lights and operated in the usual manner, and moves nonchalantly into an area where the road ahead is completely hidden from his view, and does nothing at all to protect those who may be in the hidden area, our roads will become places of potential carnage every time two motor cars meet in the night-time. . .. It is clear to us that this collision was caused by failure of appellee to look where the law required him to look, or to see what the law required him to see, or to keep his car under such control that he could stop it within the range of his vision.' (224 F.2d pp. 113-4)

The fact that Louisiana gives some elasticity to the rule as stated in these two cases does not mean that the rule is destroyed or that it does not apply in all of its force where the facts undisputedly show that there are no unusual circumstances such as the law recognizes as creating an emergency. The negligence of House was much more palpable than that of the drivers in the *Geoghegan* and the *Geigy* cases, and he was, in my opinion, guilty of negligence as a matter of law and his insurer ought not to be rescued from the obligation to pay these very badly injured people by the emergency doctrine. For the reasons stated I think the judgment should be reversed and the case remanded for another trial.

A True Copy:

Teste:

JOHN A. FEEHAN, JR., Clerk

By *Clara R. James*

Clerk of the United States Court of Appeals for the Fifth Circuit.

APPENDIX "B"

ORDER DENYING REHEARING

Extract from the Minutes of September 14, 1956.

No. 16026

WILLIAM H. HUGHES, ET AL

VERSUS

GREAT AMERICAN INDEMNITY COMPANY

It is ordered by the Court that the petition for rehearing filed in this cause be, and the same is hereby, denied.

"Cameron, Circuit Judge, dissenting."